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Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

| | | |
|--------------------------|---|----------------------|
| ----- | X | |
| | X | |
| In the Matter of: | X | |
| | X | |
| 1984 JUKEBOX ROYALTY | X | Docket No. 85-1-84JD |
| DISTRIBUTION PROCEEDINGS | X | |
| | X | |
| ----- | X | |

MOTION FOR PROCEDURAL RULING

The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. (collectively, "Settling Parties") hereby move that the Copyright Royalty Tribunal modify its notice of declaration of controversy in this matter, 50 Fed. Reg. 47794 (November 20, 1985), and conduct these proceedings in two phases: Phase I to be a determination of whether ACEMLA is a "performing rights society" for purposes of 17 U.S.C. §116, and Phase II to be a determination of entitlement.

Such a procedure would reduce the cost of these proceedings (both in time and money) to the Tribunal and the parties, and would serve the orderly administration of justice. Indeed, if ACEMLA were again determined not to be a "performing rights society," there would be no need for an evidentiary presentation on entitlement by the Settling Parties, because we have reached voluntary agreement on distribution of 1984 jukebox royalties.

I. STATUTORY BACKGROUND

The Copyright Law specifies two classes of claimants to jukebox royalties: "copyright owners" and "performing rights societies." 17 U.S.C. §116(c)(4)(A) and (B); see, ACEMLA v. CRT, 763 F.2d 101, 104 (2d Cir. 1985). The statute also requires the Tribunal to follow a sequential procedure in jukebox distribution proceedings. Distributions are to be made first "to every copyright owner not affiliated with a performing rights society," 17 U.S.C. §116(c)(4)(A), and "the remainder" is then to be distributed "to the performing rights societies," 17 U.S.C. §116(c)(4)(B). See, ACEMLA v. CRT, id.

The statute also provides that the Tribunal shall distribute royalties to the performing rights societies "as they shall by agreement stipulate among themselves," 17 U.S.C. §116(c)(4)(B).

II. THE 1982 AND 1983 PROCEEDINGS

In the consolidated 1982 and 1983 proceedings, the Tribunal was faced with competing claims to the royalty funds from ASCAP, BMI and SESAC, jointly, and ACEMLA. 50 Fed. Reg. 47577 (November 19, 1985). It properly recognized that it first had to determine whether ACEMLA was a "performing rights society"

as defined by 17 U.S.C. §116(e)(3).¹ 50 Fed. Reg. 47578. The Tribunal concluded that, at least in 1982 and 1983, ACEMLA was not a "performing rights society." 50 Fed. Reg. 47581.

The Tribunal then turned to the question of entitlement of the claimants. Although ACEMLA and its related entities had filed claims only as a "performing rights society," the Tribunal nevertheless treated them as "copyright owners." 50 Fed. Reg. 47581-82. It weighed the evidence of entitlement they had submitted, and made an award to them as such. Id.

The Tribunal then awarded the remainder to the "performing rights societies," ASCAP, BMI and SESAC, which had reached voluntary agreement. 50 Fed. Reg. 47582. Because of that complete voluntary agreement among all "performing rights societies," the Tribunal did not find it necessary to weigh any of the evidence of entitlement regarding the joint ASCAP, BMI and SESAC claim. Id.

III. THE TRIBUNAL SHOULD CONDUCT
THE 1984 DISTRIBUTION PROCEEDINGS
IN TWO PHASES

We ask that the Tribunal modify the procedure set forth in its declaration of controversy in these proceedings by

¹ No such determination was needed for ASCAP, BMI and SESAC, as each is identified by statute as a "performing rights society." 17 U.S.C. §116(e)(3).

formally establishing a two-phase procedure which follows the statutorily-mandated sequence.²

Phase I should consist of a determination of the question whether ACEMLA is a "performing rights society" for 1984 royalty fund purposes. It has claimed as such, and must prove that claim. The Tribunal would, after reviewing the evidence on this subject, but before submission of evidence on entitlement, issue its determination of ACEMLA's status.³

Phase II should then consist of a determination of entitlement. If the Tribunal determines that in 1984, as in 1982 and 1983, ACEMLA was not a "performing rights society," then we would not be put to the considerable expense of proving our entitlement. As the Tribunal has previously held, we would then be entitled to all of the fund except for the portion, if any, awarded to "copyright owners."

And, not only would our writer and publisher members and affiliates be spared the considerable cost of evidentiary submissions, but the Tribunal would not have to conduct needless hearings or waste its time with evidence it need not consider.

² This procedure would follow the logical structure of the Tribunal's 1982 and 1983 jukebox royalty distribution decision.

³ A similar procedure is followed in the Tribunal's cable distribution proceedings, in which the Tribunal issues a Phase I decision on awards to claimant groups before beginning Phase II proceedings on the division of those awards among individual claimants. While the cable procedure is not mandated by statute, experience has shown it to be administratively efficient.

In the 1982 and 1983 proceedings, about half the hearing time, and much of the content of both sides' written submissions, were devoted to evidence of our entitlement to the 5% of those funds in controversy. Yet, because of the determination that ACEMLA was not a "performing rights society," the Tribunal said that it ultimately "has not weighed" and "made no inquiry" into our evidence of entitlement, as there was no need to do so. 50 Fed. Reg. 47582. There is no justification for occupying the Tribunal's valuable time with such unnecessary submissions, nor causing the parties the resulting expense.

We believe that the Copyright Law, the court's decision, the Tribunal's prior decision and the orderly administration of justice, support such a two-phase procedure.

IV. THE TRIBUNAL SHOULD MODIFY ITS DECLARATION OF CONTROVERSY

The Tribunal's declaration of controversy in these proceedings directed "all claimants to submit any evidence to be considered by the Tribunal in the distribution of the jukebox royalty fees before May 15, 1986." 50 Fed. Reg. 47794. We respectfully request that that order be modified, so that the issue of ACEMLA's status may be addressed and decided before any evidentiary submissions on entitlement are made. We suggest that the following procedural schedule be substituted:

| <u>Date (Day)</u> ⁴ | <u>Intervening Time From Last Action</u> ⁵ | <u>Action</u> |
|--------------------------------|---|--|
| <u>PHASE I (Status)</u> | | |
| 5/15/86 (Thu.) | -- | ACEMLA submits written evidence of status as "performing rights society" |
| 5/22/86 (Thu.) | 7 days | Hearings on ACEMLA's status (if necessary) |
| 5/29/86 (Thu.) | 7 days | Settling Parties submit written rebuttal evidence on ACEMLA's status |
| 6/2/86 (Mon.) | 4 days | Rebuttal hearings on ACEMLA's status (if necessary) |
| 6/9/86 (Mon.) | 7 days | Proposed Findings of Fact and Conclusions of Law on ACEMLA's status due |
| 6/13/86 (Fri.) | 4 days | Reply Findings and Conclusions on ACEMLA's status due |
| 7/7/86 (Mon.) | 24 days | CRT decision on ACEMLA's status |

⁴ All of the suggested dates are, of course, subject to the Tribunal's scheduling convenience.

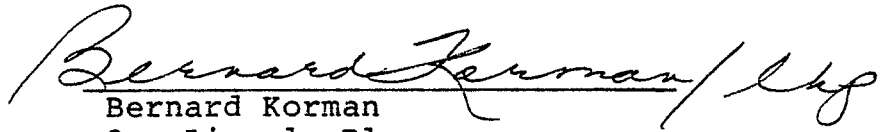
⁵ The center column gives the intervening time from the last action; thus, for example, we suggest that there be 7 days between ACEMLA's May 15 submission of written evidence of its status and the May 22 hearings on that submission.

PHASE II (Entitlement)

| | | |
|-----------------|---------|--|
| 8/18/86 (Mon.) | 42 days | Written evidence of entitlement due (if necessary) |
| 9/9/86 (Tue.) | 22 days | Hearings on entitlement (if necessary) |
| 9/19/86 (Fri.) | 10 days | Written rebuttal evidence of entitlement due (if necessary) |
| 9/24/86 (Wed.) | 5 days | Rebuttal hearings on entitlement (if necessary) |
| 10/6/86 (Mon.) | 12 days | Proposed Findings of Fact and Conclusions of law on entitlement due (if necessary) |
| 10/13/86 (Mon.) | 7 days | Reply Findings and Conclusions on entitlement due (if necessary) |
| 11/20/86 (Thu.) | 38 days | CRT decision on entitlement |

Respectfully submitted,

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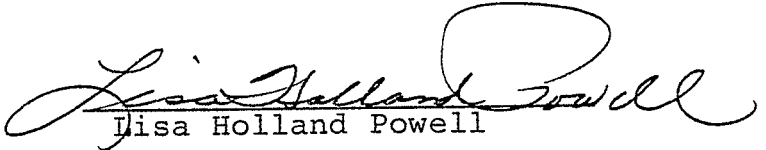
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Dated: February 27, 1986

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
"Motion For Procedural Ruling" of ASCAP, BMI and SESAC
was served, via first-class mail, postage prepaid, this
27th day of February, 1986, on the following:

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